87-1901

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

GHR ENERGY CORPORATION
(now known as TransAmerican Natural Gas Corporation),
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR and WILLIAM P. CLARK, Secretary of the Interior,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, in an action alleging that petitioner purchased oil from the United States pursuant to written contracts authorized under the Outer Continental Shelf Lands Act and was overcharged in violation of applicable federal regulations incorporated into the contracts by reference, a United States circuit court of appeals lacks any jurisdiction to determine an appeal from the district court's dismissal of the complaint, without discovery or a trial, on the ground of the United States's immunity from suit.

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The parent company of petitioner GHR Energy Corporation (now known as TransAmerican Natural Gas Corporation) ("TransAmerican") is The GHR Companies, Inc. TransAmerican's affiliates and subsidiaries (other than wholly owned subsidiaries) are as follows:

Southwest Texas Services, Inc.
TransAmerican Pipeline Corporation
(f/k/a GHR Pipeline Corp.)
TransAmerican Gas Transmission
Corporation (f/k/a/ GHR Transmission Corp.)
Southern States, Inc.
Southern States Exploration, Inc.
Southern Petroleum Trading Company, Ltd.
Laredo Exploration, Inc.
JRS Realty, Inc.
TCP Construction Co., Inc.
Southern Exploration and Production Corporation
Industrial Financial Services, Inc.

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No. ———

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(now known as TransAmerican Natural Gas Corporation),
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v.

UNITED STATES DEPARTMENT OF THE INTERIOR and WILLIAM P. CLARK, Secretary of the Interior,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner GHR Energy Corporation[1] respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit filed in the above-captioned case on February 19, 1988.

OPINIONS BELOW

The Fifth Circuit's brief per curiam opinion, dated and issued February 19, 1988 (*see* Appendix A), has not been reported. The decision of the Temporary Emergency Court of Appeals of the United States ("TECA"), dated

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[1] Now known as TransAmerican Natural Gas Corporation. The caption of the case in this Court contains the names of all the parties to the proceedings in the Fifth Circuit.

and issued March 25, 1987, is reported at 816 F.2d 689, *cert. denied*, —— U.S. ——, 108 S. Ct. 198 (1987) (*see* Appendix C)). The United States District Court for the Eastern District of Louisiana did not issue an opinion or findings of fact and conclusions of law.

JURISDICTION

The Fifth Circuit's judgment, dated and filed February 19, 1988 (*see* Appendix B), dismissed for want of subject matter jurisdiction petitioner's appeal from the judgment of the United States District Court for the Eastern District of Louisiana, entered December 4, 1985, dismissing petitioner's complaint. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) (1982).

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. § 1491 (1982), provides in pertinent part:

> § 1491. Claims against United States generally; . . .
>
> (a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

The Tucker Act, 28 U.S.C. § 1346 (1982), provides in pertinent part:

> § 1346. United States as defendant
>
> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:
>
> * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in

> amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, ...

The Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356 (1982 & Supp. III 1985), provides in pertinent part:

> § 1353. Federal purchase and disposition of oil and gas
>
> * * * *
>
> (b) Sale of oil by United States to public; disposition of oil to small refiners; application of other laws
>
> (1) The Secretary, except as provided in this subsection, may offer to the public and sell by competitive bidding for not more than its regulated price, or, if no regulated price applies, not less than its fair market value, any part of the oil (A) obtained by the United States pursuant to any lease as royalty or net profit share, or (B) purchased by the United States pursuant to subsection (a)(2) of this section.
>
> § 1349. Citizens suits, jurisdiction and judicial review
>
> (a) Persons who may bring actions; persons against whom action may be brought; time of action; intervention by Attorney General; costs and fees; security
>
> (1) Except as provided in this section, any person having a valid legal interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this subchapter against any person, including the United States, and any other government instrumentality or agency (to the extent

permitted by the eleventh amendment to the Constitution) for any alleged violation of any provision of this subchapter or any regulation promulgated under this subchapter, or of the terms of any permit or lease issued by the Secretary under this subchapter.

Section 210 of the Economic Stabilization Act of 1970 ("ESA") (codified as amended at 12 U.S.C.A. § 1904 note (West 1980)), as incorporated by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751-760h (1982), provided in pertinent part:

§ 210. Suits for damages or other relief

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to limitations in section 211), and/or damages.

Section 211 of the ESA provided in pertinent part:

§ 211. Judicial review

(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; . . . .

(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. . . . In all other respects the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to ex-

pedite the determination of cases over which it has jurisdiction under this title. . . .

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of entry of judgment by the district court.

Section 1631 of 28 U.S.C. (1982) provides in pertinent part:

§ 1631. Transfer to cure want of jurisdiction

Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

STATEMENT OF THE CASE

Between April 1974 and July 1981, petitioner contracted in writing with the United States to purchase and in fact purchased large quantities of "royalty oil," which the United States acquired and was expressly authorized to sell under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1353(b)(1). The purchase price of the oil was determined in accordance with then applicable pricing regulations promulgated by the Department of Energy and incorporated into the contracts by reference. *See, e.g.*, 39 Fed. Reg. 12,252 (1974); 41

Fed. Reg. 4,931 (1976) (regulation of petroleum pricing terminated Jan. 30, 1981, *see* Exec. Order No. 12,287, 46 Fed. Reg. 9,909 (1981)). Petitioner subsequently discovered that it had been overcharged $1,794,368.60 for transportation payments and $369,926.08 for administrative fees in violation of the applicable pricing regulations.

In March 1984, petitioner commenced a civil action against respondents in the United States District Court for the Eastern District of Louisiana to recover the overcharges. The complaint set forth five separate claims for relief, in contract (two claims), for unlawful exaction, for the unconstitutional taking of private property, and for restitution. The district court's subject matter jurisdiction was grounded on Sections 210 and 211 of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C.A. § 1904 note (West 1980), as incorporated by the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751-760h (1982); the Fifth Amendment to the United States Constitution; 5 U.S.C. § 702 (1976); 28 U.S.C. §§ 1331, 1346(a)(2), 1361, 1491, 2201, and 2202 (1976 & Supp. III 1979); and OCSLA Section 23(a)(1), 43 U.S.C. § 1349(a)(1) (Supp. V 1981).

On November 22, 1985, before discovery or a trial was had, the complaint was dismissed on respondents' motion, pursuant to Rule 12(b)(1), Fed. R. Civ. P., which urged "lack of jurisdiction of the subject matter under the doctrine of sovereign immunity, . . . based upon the final decision by the Temporary Emergency Court of Appeals ["TECA"] in *Lunday-Thagard Co. v. DOI*, [773 F.2d 322 (1985), *cert. denied*, 474 U.S. 1055 (1986)], which is the controlling law in this case." The dismissal was effected by a "minute" entry, unaccompanied by memorandum, findings of fact, or conclusions of law, which also denied petitioner's motion requesting the district court to transfer the action to the United States Claims Court, pursuant to 28 U.S.C., Section 1631, if the dis-

trict court determined that it lacked jurisdiction. The "minute" entry was followed by entry on December 4, 1985, of a judgment dismissing the complaint.

The TECA's *Lunday-Thagard* decision, on which respondents' relied in moving for dismissal of the complaint, distinguished between "statutory" overcharge claims (*i.e.*, claims "arising under" the ESA) and "contract" claims, such as those for excessive transportation payments. *Lunday-Thagard Co. v. DOI*, *supra*, 773 F.2d at 323-24. It tacitly held that review of the dismissal of the so-called "statutory" claims was within its exclusive appellate jurisdiction, but that the claims were barred under the doctrine of sovereign immunity because there was no express waiver of immunity in the ESA and because the Tucker Act's waiver of sovereign immunity did not apply. *Id.* at 323-24. It also held, however, that the so-called "contract" claims were not barred by sovereign immunity, and these claims were remanded to the district court for further proceedings or presentation to the Claims Court. *Id.* at 325-26.[2]

Confronted with the TECA's distinction between statutory claims (*i.e.*, claims said to "arise under" the ESA) and contract-based claims, and also confronted with case law holding that such a distinction is jurisdictional—resulting in the TECA having exclusive appellate jurisdiction over the ESA issues in a case and the circuit courts having exclusive appellate jurisdiction over all other issues in the same case, *see Texaco Inc. v.*

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[2] It should be noted that, under the TECA's own jurisprudence, its review of the dismissal of Lunday-Thagard's "contract" claims was analytically incompatible with a distinction between "contract" claims and "statutory" claims. This is because the TECA considers itself to be without jurisdiction to review "non-ESA" (*i.e.*, non-statutory) issues in a case. *Texaco Inc. v. DOE*, 616 F.2d 1193, 1197 (Temp. Emer. Ct. App. 1979).

DOE, 616 F.2d 1193, 1197 (Temp. Emer. Ct. App. 1979); *United States v. Wyatt*, 680 F.2d 1080, 1085 n.7 (5th Cir. 1982)—petitioner took separate appeals on December 24, 1985 to the TECA and to the Fifth Circuit from the order and judgment dismissing the complaint so as to preserve its right to a full appellate review of all issues.

On respondents' motion, opposed by petitioner, proceedings in the Fifth Circuit were stayed while the appeal to the TECA went forward. In the TECA, petitioner urged that its claims, particularly its transportation payments claims, did not "arise under" the ESA, and that the district court, therefore, had not followed *Lunday-Thagard* in dismissing the complaint. Petitioner also argued that *Lunday-Thagard* was *contra United States v. Mitchell*, 463 U.S. 206 (1983), which held that the Tucker Act waives the Government's sovereign immunity from claims based on contracts, federal statutes or regulations, and the Constitution. Petitioner also moved in the TECA to transfer to the Fifth Circuit for determination any issues the TECA determined were not within its exclusive but narrow jurisdiction.

After a year, the TECA rendered its decision on March 25, 1987, which, although it purported to "dismiss" petitioner's appeal, actually affirmed the district court's judgment. *TransAmerican Natural Gas Corp. v. DOI*, 816 F.2d 689 (Temp. Emer. Ct. App.), *cert. denied*, —— U.S. ——, 108 S.Ct. 198 (1987) (Appendix C). The grounds for the TECA's decision were (i) that all of petitioner's claims, no matter how viewed, arose out of the ESA (rather than out of contract, or other statute, or the Constitution), *id.* at 693-94 (Appendix C, at 11a-12a); (ii) that the ESA contains no express waiver of sovereign immunity, *id.* at 692, 694 (Appendix C, at 8a-9a, 12a); and (iii) that the Tucker Act's express waiver of sovereign immunity does not apply to claims viewed as

arising solely out of the ESA because exclusive subject matter jurisdiction over such claims is conferred on the district courts by the ESA, not by the Tucker Act. *Id.* at 692 (Appendix C, at 8a-9a). No issues were transferred for determination to the Fifth Circuit.

On April 24, 1987, petitioner sought a writ of certiorari from this Court to review the TECA's judgment and also moved this Court to defer consideration of the petition until proceedings in the Fifth Circuit were concluded. Both the petition and the motion were denied. *TransAmerican Natural Gas Corp. v. DOI*, —— U.S. ——, 108 S. Ct. 198 (1987).

After the TECA rendered its decision, the stay of proceedings in the Fifth Circuit was lifted, and on May 1, 1987, respondents moved to dismiss petitioner's Fifth Circuit appeal for want of subject matter jurisdiction. Petitioner opposed the motion, urging that (i) the Fifth Circuit, being of co-equal dignity, but having *non*-concurrent jurisdiction with the TECA, was bound to determine its jurisdiction unencumbered by the TECA's pronouncements on the point; and (ii) petitioner's claims ought not to be considered as arising exclusively under the ESA, as this ignored the contract-based source of petitioner's right and vitiated important property rights conferred upon petitioner by its contracts with the Government. *See Lynch v. United States*, 292 U.S. 571, 577 (1934) (contracts with Government "create vested rights" protected by Fifth Amendment; terms of such contracts often "found in part in the [contracts], in part in the statutes under which they are [entered into] and the regulations promulgated thereunder").

The Fifth Circuit determined to carry the motion with the case. Briefs on the merits were thereafter submitted in which petitioner urged, among other things, that its claims were not barred by sovereign immunity because of this Court's pronouncements in *United States v. Mitchell*, 463 U.S. 206 (1983). On February 19, 1988, the Fifth Circuit dismissed petitioner's appeal for want

of subject matter jurisdiction in a brief per curiam opinion, which cited, without discussion, the TECA's decision and *United States v. Wyatt*, 680 F.2d 1080 (5th Cir. 1982) (*see* Appendix A). A corresponding judgment was filed the same day (*see* Appendix B).

The present petition seeks a review of the Fifth Circuit's judgment, and, so that a complete review may be had within the so-called "bifurcated" appellate jurisdictional scheme in such cases, the petition is accompanied by a motion for leave to file a petition for rehearing of the Court's October 5, 1987 order denying the petition for a writ of certiorari to review the TECA's judgment (No. 86-1712).

REASONS FOR GRANTING THE WRIT

The Court Should Exercise its Supervisory Power (i) to Redress an Erroneous Decision Concerning the Fifth Circuit's Jurisdiction and (ii) to Remove an Erroneous Limitation on the Tucker Act's Waiver of the Government's Immunity from Suit in Commercial Cases

The Court has supervisory power, to be guided by considerations of justice, over the administration of justice in the federal courts. While this power is usually exercised in criminal cases, *see United States v. Hasting*, 461 U.S. 499, 505-06 (1983) (citing, *inter alia*, *McNabb v. United States*, 318 U.S. 332, 341 (1943)), it has been exercised in civil ones as well, *e.g.*, *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946) (improper formation of jury panel) and is mentioned in the Court's rules as a reason to be considered in determining whether to grant certiorari review. Rule 17.1(a), Sup. Ct. Rules.

Exercise of the Court's supervisory power is warranted in this case (i) to redress the substantial injustice that results from the combined effect of the two appellate judgments, which *together* represent the full disposition of petitioner's appeal from the district court's dismissal

of the complaint, and (ii) to instruct the lower federal courts and litigants concerning the proper scope of the Tucker Act's waiver of sovereign immunity in commercial cases. The particular injustice of this case, which is likely to repeat itself if the TECA's erroneous limitation on the Tucker Act's waiver of sovereign immunity is followed, is that, despite lengthy, costly, and duplicative appeals, petitioner is left without a federal forum in which to try what must be a relatively ordinary claim against the United States, namely, that it bought oil from the Government under contract and was overcharged in violation of the price term.

At the court of appeals level, the Fifth Circuit's judgment completes the disposition of petitioner's appeal. The Fifth Circuit's judgment, however, is limited to an issue of jurisdiction, and an admittedly specialized jurisdiction. Nonetheless, review is merited because the Fifth Circuit's decision cannot be viewed in isolation. It is the second installment of an unusual two-part appellate disposition, the whole of which ultimately rests on an issue of far-reaching public importance, namely, the availability of the federal courts to hear and determine commercial claims against the United States when subject matter jurisdiction is conferred by a statute *other* than the Tucker Act. Because the Fifth Circuit's portion of the two-part disposition is confined to the narrow issue of jurisdiction, petitioner must, in good faith, rely on the Court's supervisory power to review the Fifth Circuit's portion of the full disposition.[3]

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[3] The related question of whether the TECA's jurisdiction is issue-oriented and "bifurcated" is itself a subject of conflict among the circuits. The Second, Third, Fifth, Tenth, and District of Columbia Circuits, as well as the TECA, hold to the "bifurcated" scheme. *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *RJG Cab, Inc. v. Hodel*, 797 F.2d 111 (3d Cir. 1986); *United States v. Wyatt*, 680 F.2d 1080 (5th Cir. 1982); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979); *United*

Petitioner contends that the combined result of the appellate dispositions is wrong. When viewed together, as they should be, the appellate judgments compound the district court's initial misstep, which not only threw petitioner into an appellate jurisdictional quagmire, but also was an unfounded extension of the doctrine of sovereign immunity in direct conflict with the Court's holding in *United States v. Mitchell*, 463 U.S. 206 (1983). In that case, the Court held that "[i]f a claim falls in this *category* [*viz.*, claims founded upon statutes or regulations that create substantive rights to money damages], the existence of a waiver of sovereign immunity is clear," *id.* at 218 (emphasis added); and that "[b]ecause the Tucker Act supplies a waiver of immunity for claims *of this nature*, the separate statutes and regulations need not provide a second waiver of sovereign immunity . . . ." *Id.* at 218-19 (emphasis added). The TECA, whose published opinion is the only expository one thus far in the case, incorrectly limited these statements to actions in which the trial court's subject matter jurisdiction is grounded on the Tucker Act.

If petitioner correctly reads *United States v. Mitchell*, then issues of jurisdiction—either original or appellate—do not determine the issue of sovereign immunity. Stated otherwise, whether petitioner's claims "arise under" contract, federal statute or regulation, or the Constitution may determine which court tries the claims and hears the appeals, but does *not* determine whether the United States can be a defendant. So long as a claim is among those enumerated in the Tucker Act, the Tucker

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States v. Hill, 694 F.2d 258, 260 n.5 (D.C. Cir. 1982); *Texaco Inc. v. DOE*, 616 F.2d 1193 (Temp. Emer. Ct. App. 1979). The Sixth and Seventh Circuits construe the TECA's jurisdiction as arising only when the *entire* claim "arises under" the ESA. *Grand Blanc Educ. Ass'n v. Grand Blanc Bd. of Educ.*, 624 F.2d 47 (6th Cir. 1980); *St. Mary's Hosp. of East St. Louis, Inc. v. Ogilvie*, 496 F.2d 1324 (6th Cir. 1974).

Act supplies the necessary waiver of immunity, even though subject matter jurisdiction is conferred by a different statute. This, as we understand it, is the significance of *United States v. Mitchell*, which, however, arose in the Claims Court and which, therefore, did not raise the specific question of whether the Tucker Act's broad waiver of sovereign immunity also applies in cases, like the present one, in which subject matter jurisdiction is conferred by another statute.

The issue, though narrow, is fundamentally important to litigants prosecuting ordinary commercial claims against the United States, and it can be summarily resolved on this petition, together with a summary rehearing of the earlier-filed petition. If petitioner is vindicated, the Court will not only redress *this* case's errors—principal among which was the dismissal of the complaint before discovery and a trial—but will also resolve for other litigants the lingering confusion over the proper scope of the Tucker Act's waiver of sovereign immunity. This, we respectfully submit, would be a proper exercise of the Court's supervisory power without which the error may be perpetuated and compounded.

CONCLUSION

For the foregoing reasons, together with those set forth in petitioner's accompanying motion for leave to file a petition for rehearing of the Court's order denying the petition for a writ of certiorari to review the TECA's judgment in this case, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit, and the companion motion and petition for rehearing should be granted.

Dated: New York, New York
May 19, 1988

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3816

GHR ENERGY CORP.,
Plaintiff-Appellant,
versus
UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Defendant-Appellee

Appeal from the United States District Court
for the Eastern District of Louisiana

(February 19, 1988)

Before CLARK, Chief Judge and REAVLEY, Circuit Judge and HUNTER*, District Judge:

PER CURIAM:**

Because GHR's appeal in all aspects presents issues within the exclusive jurisdiction of the Temporary Emergency Court of Appeals, it is dismissed for want of jurisdiction.[1]

DISMISSED FOR WANT OF JURISDICTION.

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[1] *Transamerican Natural Gas Corp. v. United States Department of Interior*, 816 F.2d 689 (TECA), Cert. denied —— S. Ct. (1987). GHR changed its name to Transamerican Natural Gas Corp. in 1985. *See, United States v. Wyatt*, 680 F.2d 1080, 1083 (5th Cir. 1982)

* District Judge of the Western District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-3816

D. C. Docket No. CA-84-1520-E

GHR ENERGY CORPORATION,
Plaintiff-Appellant,

versus

UNITED STATES DEPARTMENT OF THE INTERIOR,
WILLIAM CLARK, Secretary of the Interior,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before CLARK, Chief Judge, REAVLEY, Circuit Judge, and HUNTER,* District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

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* District Judge of the Western District of Louisiana, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in this cause is hereby dismissed for want of jurisdiction.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 19, 1988

ISSUED AS MANDATE: Mar. 14, 1988

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-118

TRANSAMERICAN NATURAL GAS CORP.
(formerly GHR ENERGY CORP.),
Plaintiff-Appellant,

v.

UNITED STATES DEPT. OF INTERIOR, *et al.*,
Defendant-Appellee.

On appeal from the United States District Court
for the Eastern District of Louisiana

(District Court C.A. No. 84-1520 Section E)

(Submitted on the briefs Decided: March 25, 1987)

EDWARD C. CERNY, III and James L. Marketos, Lane & Mittendorf, New York, New York, were on the brief for the Plaintiff-Appellant.

RICHARD K. WILLARD, Assistant Attorney General, and Stephen E. Hart, Thomas Millet and Leslie K. Dellon, U.S. Department of Justice, Washington, D.C., were on the brief for Defendants-Appellees.

Before GARZA, THORNBERRY, and SEAR, Judges.

GARZA, Judge.

This case concerns the scope of the government's sovereign immunity and the applicability of a previous panel decision, *Lunday-Thagard v. United States*, 773 F.2d 322 (TECA 1985), *cert. denied*, 106 S.Ct. 792 (1986) to the facts in the case at bar. For the reasons set out below, and especially the intervening decisions of the U.S.

Claims Court, we agree with the district court's decision to dismiss the entire complaint for want of subject matter jurisdiction.

BACKGROUND

The federal government established a pricing and allocation program for the domestic oil industry during the energy crisis of the early 1970's. The Department of the Interior created a "royalty oil program" under the Outer Continental Shelf Lands Act (OCSLA), which authorized the Secretary of the Interior to grant oil and gas leases on offshore lands. 43 U.S.C. § 1331, *et seq.* This offshore royalty oil could be sold 'for not more than its regulated price, or if no regulated price applies, not less than its fair market value." 43 U.S.C. § 1353(b)(1). Section 210 of the Economic Stabilization Act of 1970 (ESA), as amended (12 U.S.C. § 1904 note (1982)), authorized suits for "damages or other relief" against all "persons" for violations of the offshore royalty oil program. Section 211 of the ESA vested exclusive jurisdiction over cases arising under the ESA, and, later, the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 751 *et seq.*, in the district courts. The Temporary Emergency Court of Appeals (TECA) was also created to have exclusive jurisdiction of all appeals arising under the ESA and EPAA. § 211 (b)(2) (ESA); § 754(a)(1) (EPAA); *MGPC, Inc. v. Dept. of Energy*, 673 F.2d 1277, 1280-81 (TECA 1982).

Plaintiff TransAmerican Natural Gas Corp. (TransAmerican)[1] purchased crude oil from the United States which the government received as its royalty oil interest from offshore leases on the Outer Continental Shelf near Louisiana. TransAmerican had three contracts with the United States: 1) from February 1, 1973 to February 1, 1976 (No. 12445); 2) from September 16, 1973 to February 1, 1976 (No. 13781); and 3) from July 12, 1976

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[1] Prior to October 1, 1985, TransAmerican's business name was GHR Energy Corp.

to July 1, 1980 (No. 15543). All three contracts began and ended before price controls were terminated pursuant to Executive Order on January 28, 1981.[2] More than three years after the price controls were lifted, on March 28, 1984, TransAmerican sued the United States in the U.S. District Court for the Eastern District of Louisiana for damages resulting from "overcharges" and transportation payments under the purchase contracts for offshore royalty oil. TransAmerican alleges that the contracts already included the price of transporting the offshore royalty oil to the point of delivery on land; TransAmerican claims it paid more than the maximum lawful price since TransAmerican paid for the transportation of the oil from the offshore drilling stations in addition to the contract price. The Complaint filed by TransAmerican specifies five different theories of recovery: Count I alleges contract damages and administrative fees due under ESA and EPAA; Count II alleges the unlawful imposition of transportation charges; Count III characterizes the government's alleged conduct as an "unlawful exaction" contrary to the governing statutes and regulations; Count V asserts a claim for restitution of [*sic*] the facts presented. Count IV alleges a constitutional claim for the unlawful taking of property in violation of the Fifth Amendment.

The United States denies the substance of these allegations. Furthermore, the United States maintains that it has not waived its sovereign immunity in actions under the ESA and EPAA and, consequently, TransAmerican's suit should be dismissed for want of subject matter jurisdiction. A previous TECA case, *Lunday-Thagard Co. v. United States*, *supra*, held that ESA §§ 210 and 211 do not constitute a waiver of sovereign immunity for claims arising under the ESA and EPAA. The government urges *stare decisis* upon this panel. In the alternative,

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[2] Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

the United States argues that TransAmerican's claims are barred by the statute of limitations.[3]

The district court granted the government's motion to dismiss for lack of jurisdiction without entering formal findings or a memorandum opinion. TransAmerican appealed this decision both to TECA and to the Fifth Circuit. The Fifth Circuit has stayed consideration of TransAmerican's appeal [4] until a decision by this TECA panel is rendered.

DISCUSSION

TransAmerican contends that *Lunday-Thagard* conflicts with the U.S. Supreme Court's decision in *United States v. Mitchell*, 463 U.S. [2]06 (1983), and, therefore, *Lunday-Thagard* should not be followed. In the alternative, if the previous TECA decision of *Lunday-Thagard* is found to be controlling, TransAmerican argues that its transportation payments claim and Fifth Amendment takings claim should not have been dismissed. The gov-

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[3] While we note that TransAmerican did not file suit until eleven years after it first began purchasing royalty oil and more than three years after the removal of price controls, we do not reach this issue because of our conclusion that no subject matter jurisdiction exists. However, our decision in *Johnson Oil Co. v. DOE and Southwestern Refining Co.*, 690 F.2d 191 (TECA 1982) foreclosed application of Louisiana's ten year limitations period to cases involving the national policy of ending regulation of the oil industry. Any other limitations period would seem to foreclose relief here. *See Lunday-Thagard v. United States*, 620 F.Supp. 3 (W.D. La. 1984) (district court found one year statute of limitations applies); 28 U.S.C. 2401(a) (general six year statute of limitations period when no other limitations period applicable) *but see Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 809 (TECA), *cert. denied*, 105 S.Ct. 173 (1984) (cause of action accrues from *first* overcharge); *CPI Crude, Inc. v. Coffman*, 776 F.2d 1546, 1551-53 (TECA 1985) (same).

[4] Case No. 85-3816 (U.S. Dept. of Interior's Motion to Stay Proceedings granted on Feb. 13, 1986; TransAmerican's Motion for Reconsideration or, in the alternative, certification of question to Supreme Court denied on March 18, 1986).

ernment asserts that the failure to waive sovereign immunity is determinative of all issues raised.

A) In *Lunday-Thagard Co. v. United States*[,] 773 F.2d 322 (TECA 1985), *cert. denied*, 106 S.Ct. 792 (1986), this Court held that ESA §§ 210 and 211 do not waive the government's sovereign immunity from suit. TransAmerican attempts to distinguish and discredit the reasoning of the *Lunday-Thagard* panel and challenges it as contrary to the controlling Supreme Court case on sovereign immunity, *United States v. Mitchell*, 463 U.S. 206 (1983).

In *Mitchell* the Supreme Court held that the jurisdiction conferred by the Tucker Act contained an express waiver of sovereign immunity. Though the Tucker Act did not by its own terms create a substantive remedy, once "the Constitution, an Act of Congress, or any regulation of an executive department" can be fairly interpreted as mandating compensation by the federal government for damages sustained, then the United States is amenable to suit. *Mitchell*, 463 U.S. at 216; 28 U.S.C. § 1491 (Tucker Act). TransAmerican hangs its hat on the language in *Mitchell* explaining that the determination of sovereign immunity is "analytically distinct" from the evaluation of whether a substantive statute creates a damages remedy. Since TransAmerican's "contract-based" claims are a *type* of claim for which the Tucker Act affords a remedy, TransAmerican concludes that sovereign immunity does not bar this suit.

However, the analysis employed in *Lunday-Thagard* and other courts concerning the ESA and EPAA is to the contrary. While the Tucker Act does embody a waiver of sovereign immunity for claims against the United States committed to the Claims Court, Congress specifically placed jurisdiction of *all* EPAA and ESA claims in the *district courts*. ESA § 211. The U.S. Claims Court has held that in view of § 211, it has no jurisdic-

tion to review actions brought under § 210. *The Poole & Kent Co. v. United States*, 566 F.2d 1189, 214 Ct. Cl. 836 (1977); *Tipperary Refining Co. v. United States*, No. 283-86C (Ct. Cl. Jan. 23, 1987). TECA also previously rejected a claim that § 211 is a specific enactment which creates an exception to the jurisdiction of the Tucker Act. *McCulloch Gas Processing Corp. v. Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712, 715-16 (TECA) [,] *cert. denied*, 439 U.S. 831 (1978). The Tucker Act does not supply a waiver of sovereign immunity for the ESA or actions under the EPAA. Therefore, the government's sovereign immunity remains inviolate; the United States is immune from suit for money damages allegedly caused by violations of the ESA and EPAA.

B) TransAmerican argues that if *Lunday-Thagard* is found to be controlling, then the takings claim and transportation payments claim should not have been dismissed. The *Lunday-Thagard* panel found that the transportation payments claim presented in the pleadings was a "non-EPAA" claim and, thus, not barred by sovereign immunity. 773 F.2d at 325. Another TECA case, *Griffin v. United States*, 537 F.2d 1130 (TECA), *cert. denied*, 429 U.S. 919 (1976) (held that ESA § 210 could provide a cause of action for an unconstitutional taking, though the *Griffin* panel found no claim actually presented. *See also McCulloch Gas, supra*, 577 F.2d at 716-17. TransAmerican asks us to reinstate the takings and transportation payment claims and transfer them to the U.S. Claims Court for further consideration.

The fact that the *Lunday-Thagard* panel characterized Lunday-Thagard's pleading as presenting a potential "non-EPAA" issue does not foreclose our review of TransAmerican's complaint. The *Lunday-Thagard* Court held only that the complaint *as drafted* could be construed as presenting a non-EPAA contract claim and the claim was remanded to the district court for considera-

tion.[5] In a recent consolidated decision concerning claims on a royalty oil contract similar to TransAmerican's, *Tipperary Refining Co. v. United States* (Case No. 283-86C) and *DeMenno/Kerndoon v. United States* (Case No. 299-86C) (Ct. Cl. Jan. 23, 1987), the U.S. Claims Court held that Fifth Amendment takings claims and other claims "related to" the ESA, EPAA and U.S. Dept. of Energy (DOE) pricing regulations arise only because of statutory claims precluded by sovereign immunity:

> "In summary, the core of each of the claims under the Tucker Act presented in plaintiffs' complaints that arise during the period of regulation is a violation of the pricing regulations. Absent the central issues of the alleged violations of ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking.
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> * * *
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> Accordingly, incorporation of ESA § 211 in the EPAA withdrew the jurisdiction of this [Claims] Court over plaintiffs' claims. . . ."

Tipperary and *DeMenno/Kerdoon*, slip op. at 6, 8. The Claims Court found it simply lacked jurisdiction to hear claims largely dependent upon interpretation of ESA or EPAA violations: it will not hear cases concerning Fifth Amendment takings claims or transportation payment claims which have as a factual genesis contracts entered into under the ESA and EPAA. The Claims Court has adopted the position advanced by the United States in this case—that both the takings and transpor-

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[5] The district court properly dismissed Lunday-Thagard's complaint without prejudice since the amount in controversy exceeded $10,000. Lunday-Thagard then proceeded to file in the U.S. Claims Court. (Cl. Ct. Case No. 408-86C). The government has renewed its argument that this claim is indivisible from the claims for violations of the ESA and EPAA and petitioned the Claims Court to dismiss the case.

tation payment claims arise from the offshore royalty oil purchase contracts. In essence, the position is that TransAmerican's claim would not exist but for the EPAA and ESA and therefore should be dismissed.

This Court and other Courts of Appeals have also consistently recognized that when purported contract claims are inseparable from alleged violations of the ESA, EPAA or the price regulations promulgated thereunder, those claims arise under § 210 of the ESA. *See, e.g., Johnson Oil Co. v. DOE and Southwestern Refining Co.*, 690 F.2d 191, 196 (TECA 1982) ("dominant claim" alleged a "violation of the pricing regulations"); *Francis Oil & Gas, Inc. v. Exxon Corp.*, 687 F.2d 484, 487 (TECA), *cert. denied*, 459 U.S. 1010 (1982); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1384 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979). *Citronelle-Mobile Gathering, Inc., v. Gulf Oil Corp.*, 591 F.2d 711, 715-16 (TECA) (per curiam), *cert. denied*, 444 U.S. 879 (1979).

Although TransAmerican requests that the claims cognizable under *Lunday-Thagard* be transferred by this Court to the Claims Court, if the case is transferred the Claims Court will dismiss the case because the gravamen of the complaint will be interpreted as statutory-derived claims under the ESA and EPAA similar to *Tipperary* and *DeMenno/Kerdoon*[6] and, consequently, the Claims Court will not have jurisdiction to hear TransAmerican's complaint. While ESA § 210 does not bar a cause of action for an unconstitutional taking, TransAmerican's supposed "takings" claim presents solely a statutory claim for overcharges.[7] Similarly, Trans-

[6] The plaintiffs in *Tipperary* and *DeMenno/Kerdoon* raised a Fifth Amendment claim and transportation payments claim almost identical to TransAmerican's claims here.

[7] TransAmerican's "takings" claim consists solely of the $2,164,294.68 damages allegedly sustained due to the breach of the royalty oil purchase contract. Of course, when the government

American's own explanation for its transportation payments claim conclusively demonstrates that it is grounded in the ESA and EPAA.[8] Rather than waste precious judicial time and resources in returning this case to the district court for a subsequent transfer to the Claims Court for further proceedings, it is the duty of this Court to resolve any possible conflicts over the ultimate existence of subject matter jurisdiction. We hold that all of TransAmerican's claims must be dismissed because they do not exist separate from the federal statutes which contain no waiver of the United States' sovereign immunity from suit.

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takes physical possession of money or property which is not lawfully owed to the government, a taking can occur. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (taking of interest on interpleader fund not justified as payment of obligation to government). However, when the determination of an amount "lawfully owed" the government requires interpretation of a contract entered into under authority of the ESA and EPAA, *any* breach of contract action could conceivably be characterized as an unconstitutional taking merely through creative pleadings. Such a rule would effectively eliminate the government's traditional immunity from suit. We decline to recognize a claim based *solely on* alleged contractual overcharges under the ESA, EPAA, and DOE pricing regulations as a constitutional takings claim which overcomes the sovereign immunity of the United States.

[8] According to TransAmerican, the price regulations (10 C.F.R. § 210.62(a) and (c)) required the Dept. of Interior (DOI) to charge TransAmerican a price for the royalty oil which included onshore delivery. Thus, TransAmerican was allegedly overcharged when it also had to pay the operators of the offshore oil wells to deliver the royalty oil from the offshore platform. TransAmerican maintains it is "entitled to a judgment . . . ordering DOI to refund to [TransAmerican] the entire amount of such unlawful overcharges plus interest in accordance with section 210 of the ESA as incorporated by section 5 of the EPAA." Complaint, ¶¶ 25, 28. The exclusive remedy for such a violation, though, is set forth in ESA § 210. When an alleged contractual claim goes to a violation of the EPAA, that claim is cognizable only as a statutory claim. *Lunday-Thagard*, 773 F.2d 326; *Johnson Oil Co. v. DOE and Southwestern Refining Co.*, 690 F.2d 191 (TECA 1982).

CONCLUSION

The case is controlled by the government's failure to waive sovereign immunity. Though represented well by the efforts of able counsel, TransAmerican's claim that sovereign immunity has been waived is contrary to our *Lunday-Thagard* decision. Moreover, the Fifth Amendment takings and transportation payment claims are not "non-EPAA" issues here. Though they are disguised in appropriate rhetoric, they are not divisible from their origin in ESA and EPAA statutory-based contracts and, therefore, are also barred due to sovereign immunity.

Appeal DISMISSED.